# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910

No. 19415

---

JOSEPH E. GAY, APPELLANT,

vs.

THE BALTIC MINING COMPANY ET AL.

---

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

---

FILED FEBRUARY 2, 1910.

(22,001)

(22,001)

# SUPREME COURT OF THE UNITED STATES.

**OCTOBER TERM, 1909.**

## No. 775.

JOSEPH E. GAY, APPELLANT,

*vs.*

THE BALTIC MINING COMPANY ET AL.

PEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

**INDEX.**



JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 7, 1910.

1 *Transcript of Record of Circuit Court.*

UNITED STATES OF AMERICA,
*District of Massachusetts, ss:*

At a Circuit Court of the United States for the First Circuit, begun and holden at Boston, within and for the District of Massachusetts, on the third Tuesday of October, being the nineteenth day of October, in the year of our Lord one thousand nine hundred and nine.

Before the Honorable Francis C. Lowell, Circuit Judge.

No. 676. Equity Docket.

JOSEPH E. GAY, Complainant,
v.
BALTIC MINING COMPANY et al., Defendants.

2 The Bill of Complaint in this cause is filed in the clerk's office on the twenty fourth day of January, A. D. 1910, and is duly entered at the present October Term of this Court, A. D. 1909, and is in the words and figures following:

*Bill of Complaint.*

(Filed January 24, 1910.)

To the Judges of the Circuit Court of the United States for the District of Massachusetts:

Joseph E. Gay, of Jaffrey, New Hampshire, and a citizen of the State of New Hampshire, brings this bill against the Baltic Mining Company, a corporation organized and existing under the laws of the State of Michigan, a citizen of the State of Michigan, and having a usual place of business in Boston, in the State of Massachusetts, William A. Paine, of Boston in the State of Massachusetts, President and Director of said Company, and a citizen of the State of Massachusetts, Frederic Stanwood, of Milton, in the State of Massachusetts, Secretary and Treasurer of said Company, and a citizen of the State of Massachusetts, and Samuel L. Smith, of Detroit in the State of Michigan, and a citizen of the State of Michigan, Thomas S. Dee, of Brookline in the State of Massachusetts, and a citizen of the State of Massachusetts, J. Henry Brooks, of Milton in the State of Massachusetts, and a citizen of the State of Massachusetts, and R. T.
3 McKeever, of said Boston, and a citizen of the State of Massachusetts, Directors of said Company.

And thereupon your orator complains and says as follows:

1. That he is the holder of one hundred (100) shares of the capital stock of the Respondent, Baltic Mining Company, a corporation duly

organized and existing by virtue of the laws of the State of Michigan.

2. That the total capital stock of the said Respondent, Baltic Mining Company, already issued and outstanding consists of two million five hundred thousand dollars ($2,500,000) divided into one hundred thousand (100,000) shares of the par value of twenty-five dollars ($25.) each.

3. That by the terms of the articles of incorporation of the said Respondent, Baltic Mining Company, said Company is organized for the purpose of engaging in and carrying on the business of mining, refining and smelting copper and copper ores and minerals containing copper and copper ores, and manufacturing the same.

4. That the property and assets of the said Respondent, Baltic Mining Company, at the present time amount to more than two million dollars ($2,000,000).

5. That the net profits or income of the said Respondent, Baltic Mining Company, during the year ending December 31, 1908, as shown by its annual report submitted to its shareholders amounted to the sum of nine hundred thousand one hundred sixty-four dollars and sixty-eight cents ($900,164.68) above all ordinary and necessary expenses actually paid within the year out of the income of
4 the said Respondent, Baltic Mining Company, in the maintenance and operation of its business and properties, all sums paid for taxes imposed under the authority of the United States of America, the State of Michigan or the State of Massachusetts, all sums charged to depreciation of property, and after further deducting the sum of five thousand dollars ($5,000) from the gross income of said Respondent, Baltic Mining Company.

6. That under and by virtue of the alleged authority of the provisions of Paragraph 3 of Section 38 of an Act of Congress of the United States entitled "An Act to Provide Revenue, Equalize Duties and Encourage the Industries of the United States, and for Other Purposes," approved August 5, 1909, the Respondent, Baltic Mining Company, is liable on or before the first day of March, 1910, to make a true and accurate return under the oath or affirmation of its President, Vice-President, or other principal officer, and its Treasurer or Assistant-Treasurer, to the Collector of Internal Revenue for the Third District of Massachusetts, setting forth:

*a*. The total amount of the paid up capital stock of the said Baltic Mining Company outstanding on December 31, 1909.

*b*. The total amount of the bonded and other indebtedness of the said Baltic Mining Company on December 31, 1909.

*c*. The gross amount of the income of the said Baltic Mining Company received by it from all sources during the year ending December 31, 1909.

*d*. The total amount of all the ordinary and necessary expenses actually paid out of the earnings of the said Baltic Mining Company in the maintenance and operation of its business and prop-
5 erties within the said year ending December 31, 1909, stating separately all charges by way of rentals or franchise payments required to be made by it as a condition to the continued use or possession of its property.

*e.* The total amount of all losses actually sustained by the said Baltic Mining Company during the year ending December 31, 1909, not compensated by insurance or otherwise, stating separately any amounts allowed for depreciation of property.

*f.* The amount of interest actually paid by the said Baltic Mining Company within the year ending December 31, 1909, on its bonded or other indebtedness to an amount not exceeding its paid up capital stock.

*g.* All amounts actually paid by the said Baltic Mining Company within the year ending December 31, 1909, for taxes imposed under the authority of the United States, the State of Michigan or the Commonwealth of Massachusetts.

*h.* The net income of the said Baltic Mining Company after making all the deductions authorized in Paragraphs 2 and 3 of Section 38 of the said Act of Congress above mentioned.

7. That by virtue of the laws of the State of Michigan and the By-Laws of the said Respondent, Baltic Mining Company, regularly and lawfully adopted by the shareholders of the said Respondent, Baltic Mining Company, the management of the property, affairs and concerns of the said Respondent, Baltic Mining Company, is committed to its Board of Directors; and that under and by virtue of the alleged authority of the provisions of the Act of Congress set forth in Paragraph 6 of this Bill, Section 38 of said Act, the Respondent, Baltic Mining Company, is liable to pay and that the Respond-
6 ents, Directors of said Baltic Mining Company, intend to cause to be paid to the Commissioner of Internal Revenue for the United States of America for the use of the said United States, on or before the 30th day of June, 1910, and on or before the 30th day of June in each year thereafter, a tax of one per cent (1%) for the year ending December 31, 1909, and for each year ending December 31 thereafter, upon the entire net income of the said Respondent, Baltic Mining Company, over and above five thousand dollars ($5,000) received by it from all sources during such year, excepting dividends received by it from shares owned by it in other Companies which are themselves subject to the provisions of the Act of Congress above mentioned.

8. And your Orator further represents that the said provisions of Section 38 of the said Act of Congress above referred to providing for a tax of one per cent (1%) upon the entire net income over and above five thousand dollars ($5,000) of every corporation, joint stock company, or association, organized for profit, and having a capital stock represented by shares, are unconstitutional, null and void, as to the said Respondent, Baltic Mining Company, for the following reasons:

*a.* The provisions of Section 38 of said Act of Congress above mentioned originated in the Senate of the United States and were concurred in by the House of Representatives subsequent thereto. Whereas it is provided by the Constitution of the United States, Article I, Section 7, that all measures for raising revenue shall originate in the House of Representatives.

*b.* The said provisions of Section 38 of said Act of Congress above

mentioned constitute a violation of the provisions of the Fifth
7 Amendment of the Constitution of the United States, in that they deprive the said Respondent, Baltic Mining Company, and its shareholders, of their property without due process of law. And further that the said provisions impose no tax of this kind upon individual owners or operators of properties such as are owned or operated by the Respondent, Baltic Mining Company, and therefore that said provisions deny the said Respondent, Baltic Mining Company, and its shareholders the equal protection of the laws.

*c.* The said provisions of Section 38 of said Act of Congress above referred to constitute a direct tax in respect of the property held and owned by the said Respondent, Baltic Mining Company. Whereas it is provided in the Constitution of the United States, Article I, Section 9, that no capitation or other direct tax shall be laid by Congress unless in proportion to the census or enumeration in said Constitution directed to be taken.

*d.* That if said provisions of Section 38 of said Act of Congress above referred to do not constitute a direct tax on the property held and owned by the said Respondent, Baltic Mining Company, they must be a tax upon the franchise of said Company, and Congress has no power under the Constitution of the United States to impose a tax on franchises granted by a sovereign State of the Union.

9. That he has requested the Respondents, Directors of the said Baltic Mining Company, to refrain from filing any returns under the provisions of the said Act of Congress above referred to, with the Collector of Internal Revenue for the Third District of Massachusetts, and to refrain from paying any tax on the earnings of the said
8 Baltic Mining Company in accordance with the provisions of the said Act of Congress above referred to. A copy of your Orator's letter, written by his duly authorized attorney, to the Respondent, Paine, President of said Respondent, Baltic Mining Company, is hereto attached and marked "A."

10. That the Respondents, Directors of the said Baltic Mining Company, have, by vote duly passed, resolved and determined, and avowed their intention to comply with all and singular the said provisions of said Section 38 of the said Act of Congress above referred to by causing the Respondent, Paine, and the Respondent, Stanwood, to make the said return to the Collector of Internal Revenue for the Third District of Massachusetts, as provided in Paragraph 3 of Section 38 of said Act of Congress above mentioned, and by causing to be paid to the Commissioner of Internal Revenue for the United States of America for the use of the said United States, the said tax upon all the net profits or income of the said Respondent, Baltic Mining Company, as set forth in Paragraph 7 of this Bill. In accordance with said vote the Respondent, Paine, wrote your Orator, by letter addressed to his attorney, a copy of which letter of the Respondent, Paine, is hereto annexed and marked "B."

11. That if the said Respondents, Directors of the said Baltic Mining Company, shall cause the Respondent, Baltic Mining Company, to pay the said tax out of its gains, income and profits, as they have proposed and declared their intention of doing, they will dimin-

sh the assets of the said Respondent, Baltic Mining Company, and essen the dividends to be derived from its shares by its shareholders, and will thereby lessen the value of the said shares; and that a voluntary compliance with the provisions of said Section 38 of the said Act of Congress above mentioned will expose the said Respondent, Baltic Mining Company, to a multiplicity of suits by and on behalf of its shareholders, and that such suits will work irreparable injury to the business of the said Respondent, Baltic Mining Company, and will subject it to great and irreparable damage, to the great and irreparable damage of your Orator and all the shareholders of the said Respondent, Baltic Mining Company.

12. That the capital stock of the said Respondent, Baltic Mining Company, is divided among a number of persons, and that this Bill is filed for an object common to all of said shareholders, and your Orator therefore brings this Bill not only in his own behalf as a shareholder of the said Respondent, Baltic Mining Company, but also as a representative and on behalf of such of the other shareholders of the said Respondent, Baltic Mining Company, similarly situated and interested, as may from time to time choose to intervene and become parties to this Bill.

13. That he is now and has been since the formation of the said Baltic Mining Company the owner and registered holder of one hundred (100) shares of the capital stock of the said Respondent, Baltic Mining Company, of a value exceeding the sum of ten thousand dollars ($10,000); and that this suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance.

14. That the said Respondent, Baltic Mining Company, is not engaged in interstate commerce.

15. And your Orator further represents that this is a suit of a civil nature in equity, that the matter in dispute exceeds, exclusive of costs, the sum of two thousand dollars ($2,000), that said suit arises under the Constitution or laws of the United States, and that said suit is furthermore a controversy between citizens of different States.

Wherefore your Orator prays:

1. That it may be decreed that the provisions of Section 38 of the said Act of Congress above mentioned, providing for the imposition of a tax of one per cent (1%) upon the entire net income over and above five thousand dollars ($5,000) of every corporation, joint stock company, or association organized for profit, and having a capital stock represented by shares, are unconstitutional, null and void, so far as they may apply to the said Respondent, Baltic Mining Company.

2. That each and every one of the said Respondents may be perpetually restrained from complying with the provisions of Section 38 of the said Act of Congress above mentioned, by making any lists, returns or statements, to the Collector of Internal Revenue for the Third District of Massachusetts, as aforesaid.

3. That each and every one of the said Respondents may be perpetually restrained from complying with the provisions of Section 38

of the said Act of Congress above mentioned, by paying any tax of one per cent (1%), on or before June 30, 1910, or at any time thereafter, on the net earnings of the said Respondent, Baltic Mining Company, for the year ending December 31, 1909, to the Commissioner of Internal Revenue for the United States of America.

4. That an injunction be issued by this Honorable Court restraining and enjoining the Respondents, and each and every one
11 of them, from making any list, return or statement, to the Collector of Internal Revenue for the Third District of Massachusetts, in conformity with Section 38 of the said Act of Congress above mentioned, or taking any steps preliminary to making said list, return or statement until the further order of this Court.

5. That this Honorable Court will decree to your Orator his costs of this suit.

6. That your Orator may have such other and further relief as the nature of his case requires.

New York, January 21st, 1910.

JOSEPH E. GAY.

STIMSON & STOCKTON,
HARRIS LIVERMORE.
*Counsel & Solicitors for Petitioner.*

STATE OF NEW YORK,
—— *New York*, ss:

NEW YORK, *Jan.* 21*st*, 1910.

On this 21st day of January, 1910, before me personally appeared Joseph E. Gay, to me known to be the person described in the foregoing Bill and made oath that the statements subscribed by him are true, except those which are alleged to be on information and belief, and as to those that he believes them to be true.

[SEAL.] HAMILTON L. WHITLOCK,
*Notary Public, Notary Public Kings County.*

Certificate filed — New York County.

12 "A."

DECEMBER 22, 1909.

William A. Paine, Esq., President Baltic Mining Co., 82 Devonshire St., Boston.

DEAR SIR: I write on behalf of Mr. Joseph E. Gay, a citizen of Jaffray, New Hampshire, and a stockholder in the Baltic Mining Company, to object to the payment by said Baltic Mining Company of any tax under the recent Act of Congress approved August 5, 1909, and further to object to the filing of any returns with the Collector of Internal Revenue for this District by the officers of said Baltic Mining Company.

I beg that you will take this matter up at the next meeting of your Board of Directors and present my letter for the action of the Directors thereon.

Will you kindly advise me at your earliest convenience what the intention of the Directors regarding said tax and returns may be?

Very truly yours, HARRIS LIVERMORE.

13 "B."

DECEMBER 30, 1909.

Harris Livermore, Esq., 53 State St., Boston, Mass.

DEAR SIR: I have yours of December 22nd in which, on behalf of Mr. Joseph E. Gay, a stockholder in our Company, you object to the payment by this Company of any tax under the recent Act of Congress approved August 5th, 1909, and also to the filing of any returns with the Collector of Internal Revenue for this District by the officers of the Company; and further request that the matter be taken up by the Board of Directors and that you be advised of the intention of the Directors regarding said tax and returns.

I have now to advise you that your letter was considered at a meeting of the Board of Directors held this day, and it was Voted to instruct the officers of the Company to file the returns with the Collector of Internal Revenue, and also to pay the tax, as required by law.

I regret that Mr. Gay, whom you represent, will not approve of our action, but as the law stands, the Directors do not feel there is any other course open to them.

Very truly yours,

WILLIAM A. PAINE, *President.*

14 On the twenty eighth day of January, A. D. 1910, the following Motion to Amend Bill of Complaint is filed by consent:

*Motion to Amend Bill of Complaint.*

(Filed by Consent Jan. 28, 1910.)

And now comes your orator in the above entitled cause and moves to amend his bill heretofore filed by striking out paragraph 5 thereof and substituting the following:

"5. That the net profits or income of the said respondent, Baltic MiningCompany,during the year endingDecember 31,1908,as shown by its last annual report submitted to its shareholders amounted to the sum of nine hundred thousand one hundred and sixty four dollars and sixty eight cents ($900,164.68) above all ordinary and necessary expenses actually paid within the year out of the income of the said respondent, Baltic Mining Company, in the maintenance and operation of its business and properties, all sums paid for taxes imposed under the authority of the United States of America, the State of Michigan or the State of Massachusetts, all sums charged to depreciation of property, and after further deducting the sum of five thousand dollars ($5,000) from the gross income of said respondent, Baltic Mining Company. And your orator is informed and believes that the net profits of the said respondent, Baltic Mining Company,

as above set forth, and after making the aforesaid deduction of five thousand dollars ($5,000) from its gross income have amounted during the year ending December 31, 1909, to not less than the aforesaid sum of nine hundred thousand one hundred sixty four dollars and sixty eight cents ($900,164.68)."

By His Solicitors, STIMSON & STOCKTON.
HARRIS LIVERMORE.

15 On the same day, the foregoing Motion to Amend Bill of Complaint is allowed by the Court, the Honorable Le Baron B. Colt, Circuit Judge, sitting.

Also on the same day, the following Demurrer is filed:

*Demurrer.*

(Filed Jan. 28, 1910.)

The demurrer of the Baltic Mining Company, William A. Paine, President and Director of said Company, Frederic Stanwood, Treasurer and Secretary of said Company, and Samuel L. Smith, Thomas S. Dee, J. Henry Brooks, R. T. McKeever, Directors of said Company, the above named respondents, to the bill of complaint of Joseph E. Gay, the above named complainant.

The respondents, by protestation, not confessing or acknowledging all or any of the matters or things in the said bill of complaint contained, to be true in such manner and form as the same are therein set forth and alleged, do demur to the said bill, and for cause of demurrer show as follows, namely:

That the complainant has not in and by his said bill made or stated such a case as entitles him in a Court of Equity to any relief against the respondents, or any of them, as to the matters contained in the said bill, or any of such matters.

16 Wherefore, and for divers other good causes of demurrer appearing on the said bill, the respondents do demur thereto. And they pray the judgment of this Honorable Court whether they shall be compelled to make any answer to the said bill; and they humbly pray to be hence dismissed with their reasonable costs in this behalf sustained.

CHARLES A. SNOW,
JOSEPH H. KNIGHT,
*Solicitors and Counsel for Respondents.*

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

CHARLES A. SNOW,
*Of Counsel for Respondents.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

JANUARY 28TH, A. D. 1910.

I, Frederic Stanwood, being duly sworn, depose and say that I am the Treasurer and Secretary of the Baltic Mining Company, and as

such am one of the above named respondents, and do further say that the foregoing demurrer is not interposed for delay.

FREDERIC STANWOOD.

Sworn to before me at Boston, Massachusetts, the 28th day of January, A. D. 1910.

CHARLES A. SNOW,
*Justice of the Peace.*

17 This cause is thereupon, to wit, January 28, 1919, set down for hearing and fully heard by the Court on demurrer, the Honorable Le Baron B. Colt, Circuit Judge, sitting as aforesaid, said demurrer being sustained by the Court.

On the same day, the following Final Decree is entered:

*Final Decree.*

January 28, 1910.

COLT, *J.:*

This cause came on to be heard upon the demurrer of the respondents to the complainants bill of complaint, and thereupon it is ordered, adjudged and decreed that the demurrer be allowed, and that the complainant's bill be and the same is dismissed, with costs to be paid by the complainant to the respondents.

By the Court:

CHARLES K. DARLING, *Clerk.*

18 From the final decree the complainant claims an appeal to the Supreme Court of the United States, and gives good and sufficient security that he will prosecute his appeal to effect and answer all damages and costs if he fail to make his plea good and said appeal is allowed.

A true record.

Attest:

CHARLES K. DARLING, *Clerk.*

19 *Complainant's Appeal*

(Filed Jan. 29, 1910.)

And now comes the complainant in the above entitled cause and claims an appeal to the Supreme Court of the United States from the decree of this Honorable Court sustaining the demurrer of the respondents.

FREDERIC J. STIMSON,
L. M. STOCKTON,
HARRIS LIVERMORE,
*Solicitors and of Counsel for Joseph R. Gay.*

*Assignment of Errors.*

(Filed Jan. 31, 1910.)

1. The Court erred in ordering that the demurrer of the respondents be allowed, and in dismissing the bill of the complainant.

2. The Court erred in ruling that the provisions of Section 38 of the Act of Congress referred to in the complainant's bill are within the Constitution of the United States, and that the respondent, Baltic Mining Company, is liable to make the returns and pay the tax provided for in Section 38 of the said Act of Congress. Whereas the provisions of said Section 38 are unconstitutional, null and void as to the said respondent, Baltic Mining Company, for the following reasons:

*a.* The said provisions originated in the Senate of the United States and were concurred in by the House of Representatives subsequent thereto. Whereas it is provided by the Constitution of the United States, Article 1, Section 7, that all measures for raising revenue shall originate in the House of Representatives.

20 *b.* The said provisions constitute a violation of the provisions of the Fifth Amendment to the Constitution of the United States in that they deprive the said respondent, Baltic Mining Company, and its shareholders, of their property without due process of law; and further that the said provisions impose no tax of this kind upon individual owners and operators of mines and mining property, and therefore that said provisions deny the said respondent, Baltic Mining Company and its shareholders the equal protection of the laws.

*c.* The said provisions constitute a direct tax in respect of the property held and owned by the said respondent, Baltic Mining Company. Whereas it is provided in the Constitution of the United States, Article 1, Section 9, that no capitation or other direct tax shall be laid by Congress unless in proportion to the census or enumeration in said Constitution directed to be taken.

*d.* That if said provisions do not constitute a direct tax on the property held and owned by the respondent, Baltic Mining Company, they must be a tax upon the franchise of said company, and Congress has no power under the Constitution of the United States to impose a tax upon franchises granted by a sovereign State of the Union.

*e.* The tax imposed by the said provisions is not uniform
21 throughout the United States. Whereas it is provided by Article 1, Section 8 of the Constitution, that all duties, imports and excises shall be uniform throughout the United States.

FREDERIC J. STIMSON,
LAWRENCE M. STOCKTON,
HARRIS LIVERMORE,
*Solicitors and of Counsel for Complainant.*

22 *Bond to Party on Appeal.*

(Filed and Approved Jan. 31, 1910.)

Know all Men by these Presents, That We, Joseph E. Gay, of Jaffray, in the State of New Hampshire, and William G. Nickerson, of Boston, in the State of Massachusetts, are held and firmly bound unto The Baltic Mining Company, William A. Paine, Frederic Stanwood, Samuel L. Smith, Thomas S. Dee, J. Henry Brooks, and R. T. McKeever, in the full and just sum of two hundred dollars, to be paid to the said Baltic Mining Company, Paine, Stanwood, Smith, Dee, Brooks and McKeever, their certain Attorneys, Executors, Administrators, or Assigns; to which payment well and truly to be made we bind ourselves, our Heirs, Executors, and Administrators, jointly and severally, by these Presents.

Sealed with our seals, and dated the thirty first day of January in the year of our Lord one thousand nine hundred and ten.

Whereas lately at a Circuit Court of the United States, held at Boston, within and for the District of Massachusetts, in a suit depending in said Court between Joseph E. Gay and the Baltic Mining Company and others, decree was rendered against the said Joseph E. Gay and the said Joseph E. Gay having obtained an Appeal to remove the said cause to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Baltic Mining Company, Paine, Stanwood, Smith, Dee, Brooks, and McKeever, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington on the 26th day of February, A. D. 1910.

Now the condition of the above obligation is such, that if the said Joseph E. Gay shall prosecute his said Appeal to effect, and answer all damages and costs, if he fail to make his plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

JOSEPH E. GAY, [L. S.]
By HARRIS LIVERMORE, *Attorney.*
WILLIAM G. NICKERSON. [L. S.]

Signed, sealed and delivered in presence of
A. A. ASHMAN.

This bond is satisfactory to the respondents and is approved by their counsel.

CHARLES A. SNOW.
JOSEPH H. KNIGHT.

Approved:
LE BARON B. COLT,
*United States Circuit Judge.*

23 *Citation on Appeal.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Baltic Mining Company, a corporation organized and existing under the laws of the State of Michigan, a citizen of the State of Michigan, and having a usual place of business in Boston, in the State of Massachusetts; William A. Paine, of Boston, in the State of Massachusetts, President and Director of said Company, and a citizen of the State of Massachusetts; Frederic Stanwood, of Milton, in the State of Massachusetts, Secretary and Treasurer of said Company, and a citizen of the State of Massachusetts, and Samuel L. Smith, of Detroit, in the State of Michigan, and a citizen of the State of Michigan; Thomas S. Dee, of Brookline, in the State of Massachusetts, and a citizen of the State of Massachusetts; J. Henry Brooks, of Milton, in the State of Massachusetts, and a citizen of the State of Massachusetts, and R. T. McKeever, of said Boston, and a citizen of the State of Massachusetts, Directors of said Company, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States in the city of Washington, D. C., on the* twenty sixth day of February next, pursuant to an Appeal duly obtained from a decree of the† Circuit Court of the United States for the District of Massachusetts, wherein Joseph G. Gay, of Jaffray, New Hampshire, and a citizen of the State of New Hampshire, is appellant and you are appellees, to show cause, if any there be, why the said decree, entered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Le Baron B. Colt, Judge of the Circuit Court of the United States for the District of Massachusetts, this 31st day of January, in the year of our Lord one thousand nine hundred and ten.

LE BARON B. COLT,
*U. S. Circuit Judge.*

---

*Not exceeding 30 days from the day of signing.
†Name of Court in which the Decree is entered.

24 *Acknowledgment of Service on Citation on Appeal.*

BOSTON, *January* 31*st*, 1910.

Due service of the within citation is hereby acknowledged.

CHARLES A. SNOW,
JOSEPH H. KNIGHT,
*Solicitors and Counsel for Appellees.*

5 *Clerk's Certificate.*

NITED STATES OF AMERICA,
*District of Massachusetts, ss:*

I, Charles K. Darling, Clerk of the Circuit Court of the United tates for the District of Massachusetts, within the First Circuit, ertify that the foregoing is a true copy of the record and all proceedngs in the cause in equity entitled, No. 676, Joseph E. Gay, Complainant, v. Baltic Mining Company et al., Defendants, in said Circuit Court determined, the Complainant's Appeal, the Assignment of Errors, the Bond on Appeal, and also the original Citation issued upon the appeal of the complainant in said cause, with the Acknowldgment of Service thereon.

In testimony whereof, I hereunto set my hand and affix the seal of said Circuit Court, at Boston, in said District, this thirty first day of January, A. D. 1910.

[Seal of the Circuit Court, Massachusetts.]

CHARLES K. DARLING, *Clerk.*

Endorsed on cover: File No. 22,001. Massachusetts C. C. U. S. Term No. 775. Joseph E. Gay, appellant, vs. The Baltic Mining Company et al. Filed February 2d, 1910. File No. 22,001.

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

**No. 775.**

JOSEPH E. GAY, APPELLANT,

v.

THE BALTIC MINING COMPANY ET AL.

## MOTION TO ADVANCE CASE FOR ARGUMENT.

Comes now the appellant in the above entitled case and moves that this Honorable Court may advance the said case for hearing on March 14, 1910, for the following reasons:

1. That the matters involved in said case concern the constitutionality of the provisions of Section 38 of an Act of Congress, approved August 5, 1909, entitled "An Act to Provide Revenue, Equalize Duties, and Encourage the Industries of the United States, and For Other Purposes".

2. That he is informed that this Honorable Court has advanced for argument on March 14, 1910, certain other cases involving the constitutionality of said Section 38 of said Act of Congress, one of which cases is entitled *Flint* v. *Stone Tracy Company*.

3. That the respondent corporation, Baltic Mining Company, is engaged in the business of mining copper entirely within the State of Michigan.

4. That he therefore believes that the said case entitled *Joseph E. Gay* v. *Baltic Mining Company and others*

involves the consideration of questions of law which arise in the said cases already advanced for argument, and furthermore involves additional questions of law arising under Section 38 of said Act of Congress above referred to.

5. That the decision of this Honorable Court in said case entitled *Joseph E. Gay* v. *Baltic Mining Company and others* will be of great and immediate importance to him and is a matter of general public interest in that it will affect a great number of shareholders in similar corporations.

FREDERIC J. STIMSON,
LAWRENCE M. STOCKTON,
HARRIS LIVERMORE,
*Counsel and Solicitors for Appellant.*

# Supreme Court of the United States.

JOSEPH E. GAY

*v.*

THE BALTIC MINING COMPANY *et al.*

*BRIEF OF THE APPELLANT, JOSEPH E. GAY.*

I.

Admitting, for the purposes of this paragraph, that Section 38 of the Act of Congress of August 5, 1909, imposes, as it alleges, an excise tax on the doing of certain businesses, it is not "due process of law" within the meaning of the Fifth Amendment to the Constitution of the United States, in that it does not apply to individuals; and that, while it does apply to "associations," it does not apply to partnerships carrying on the same business.

The War Revenue Act of 1898, sustained in

*Spreckels, etc., Co.* v. *McClain*, 192 U.S. 397,

applied equally to all corporations and persons engaged in the business taxed. Moreover, it applied not, as here, to income derived "from all sources," but to "gross receipts . . . in their respective business." So, even the banknote tax law applied to notes of any *person*, state bank or state banking association "used for circulation and paid out" by national or state banks.

*Veazie Bank* v. *Fenno*, 8 Wall. 533, 539.

So also as to the statute of Missouri discussed in

*Pacific Express Co.* v. *Siebert*, 142 U.S. 339, 340,

which applied to "Any person, persons, joint-stock association, company or corporation" doing an express business.

Corporations are persons within the meaning of the Fifth Amendment and the property clauses of the Fourteenth Amendment.

*Pembina Mining Co.* v. *Pa.*, 125 U.S. 181, 189;
*Covington Co.* v. *Sandford*, 164 U.S. 578, 592;
*Gulf, Colorado & Sante Fe Ry.* v. *Ellis*, 165 U.S. 150–154;
*Smyth* v. *Ames*, 169 U.S. 466, 522,

and, especially as to taxation, see

*Railroad Tax Cases*, 13 Fed. 722; 18 Fed. 385.
*Southern Railway et al.* v. *Georgia*, decided by this Court February 21, 1910.
*Guthrie on the Fourteenth Amendment*, pp. 113, 119.
Mr. Justice Field, in *San Bernardino Co.* v. *Southern Pacific R.R.*, 118 U.S. 417, 422.
*N.P. R.R.* v. *Walker*, 47 Fed. 681, 686.

"A company lawfully doing business in the State is no more bound by a general unconstitutional enactment than a citizen of the State."

Holmes, J., in *Carroll* v. *Greenwich Ins. Co.*, 199 U.S., 409.

In other words, corporations have all *property* rights guaranteed by the Federal Constitution, though they may not have all the personal liberty rights appropriate to natural citizens, for instance, such as are declared by Article IV., Section 2, Clause 1, of the Federal Constitution. In other respects they are citizens.

In the various constitutions the phrases "due process of law" and "law of the land" are "used interchangeably . . .

but they are synonymous"; the words of the Fourteenth Amendment confer no new rights, but add a Federal guaranty against State action; and both Fifth and Fourteenth Amendments presuppose equality before the law.

*Harding* v. *People*, 160 Ill. 459; S.C. 32 L.R.A. 445, 447, and cases cited.
*Carroll* v. *Greenwich Ins. Co.*, 199 U.S. 401, 410.
*Mobile R.R.* v. *Tennessee*, 153 U.S. 486, 506.
*Cooley*, "*Constitutional Limitations*," Sixth Edition, pp. 479–483.

"It was not within the power of the States *before* the Fourteenth Amendment to deprive citizens of the equal protection of the laws."

*Cooley*, *ibid.*, p. 490.

Could the laws supposed by Mr. Justice Brewer in

*Gulf, Colorado & Sante Fe Ry.* v. *Ellis*, 165 U.S. 150 at p. 155,

have been enacted by the Federal Government under the Fifth Amendment?

The words "due process of law" in the Fifth Amendment have therefore the full meaning and intention more amply expressed in the Fourteenth Amendment by the addition of the words "equal protection of the laws." The latter phrase was but added to make clear, and with special reference to statutes, as the use of the plural in the word "laws" shows. The Fifth Amendment is the modern expression of the famous clause ending with the words "*vel per legem terrae*" in the Magna Carta of King John (Cap. 39), as amplified in the corresponding words in the Magna Carta of Henry III. (Cap. 35) two years later by the addition "*de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis*" after the word "*dissaisietur*," and expressed in modern language by the words "due process of law" in Edward the Third's Confirmation of the Charter (Cap. 3) in 1354. The principle of equality before the law was even anterior to Magna

Carta, dating at least from the Charter of Liberties of Henry II. (1154). For comparison of these phrases, see

*Stimson's Federal and State Constitutions of the United States*, pp. 75, 80, 90.

*Taswell-Langmead, English Constitutional History*, Sixth Edition, quoting Coke, pp. 104–107.

*Hannis Taylor, Origin and Growth of the English Constitution*, Vol. II., p. 3.

Words in the Federal Constitution, as is well known, are to be construed and extended according to their full historical meaning acquired at the time of its adoption.

*Cooley, Principles of Constitutional Law*, Fourth Edition, p. 387.

*Mattox* v. *U.S.*, 156 U.S. 237,

*Kepner* v. *U.S.*, 195 U.S. 100,

and for a historical discussion, see

*Stimson's Federal and State Constitutions of the United States*, pp. 6, 7 and (as to equality before the law) p. 16.

Unequal taxation, not based upon a reasonable classification, is not "due process of law," and an excise tax imposed on the doing of business, like a simple property tax (save where imposed as a charter limitation by the sovereignty creating a corporation), must apply alike to all persons and all corporations engaged in the same business. A franchise tax may be imposed in lieu of or in addition to a simple property tax, but where the tax is not imposed upon the charter to do business as a corporation as such, it must apply equally to corporations and individuals.

II.

If not a simple excise tax on the doing of business it can only be an excise tax on the doing of business *under a corporate charter*. There can be no distinction between this and a tax on

the charter itself. For instance, if the Federal Government may not impose a tax on the amount of the capital stock authorized on the day that a State corporation charter is granted, it may not impose an annual tax on the doing of business thereunder. Neither State nor Nation — governments of equal dignity in their respective spheres — may impose such tax upon each other's corporations, save only so far as they are property taxes imposed by the States, or taxes imposed by the Federal Government in the exercise of functions otherwise constitutional. "The States cannot directly or indirectly burden the exercise by Congress of the powers committed to it by the Constitution, nor may Congress burden the agencies or instrumentalities employed by the States in the exercise of their powers."

*Argument of Mr. Solicitor General Hoyt* for the Government in *Spreckels Co.* v. *McClain*, 192 U.S. 404.

*Collector* v. *Day*, 11 Wall. 113–124.

*Fifield* v. *Close*, 15 Mich. 505, cited with approval in Cooley's Constitutional Limitations, Sixth Edition, p. 592.

A State may not tax the corporate franchise of a Federal corporation,

*McCulloch* v. *Maryland*, 4 Wheat. 316,

*California* v. *Central Pacific R.R.*, 127 U.S. 41,

nor may it tax its business if it be a Federal function, such, for instance, as interstate commerce; nor can a State impose a franchise tax even on the stock of corporations incorporated in other States and doing business in the State imposing the tax, if it do not tax its own corporations in the same manner.

*Southern Railway* v. *Georgia*, *supra*.

*Western Union Telegraph Co.* v. *Kansas*, 30 S.C.R. 190.

That the Act in question imposes the tax also on United States corporations does not save it. Neither sovereignty can impose a naked tax upon corporate franchises granted by the other.

The power to impose the tax in question is "exercised for ends inconsistent with the limited grants of power in the Constitution" within the meaning of these words by Chief Justice Chase in

*Veazie Bank* v. *Fenno*, 8 Wall. 541.

See also

*Lane Co.* v. *Oregon*, 7 Wall. 71, 76.

Even Chief Justice Chase's opinion in the Veazie Bank case does not decide that Congress may impose a tax on a State corporation franchise, although "not conferred for the purpose of giving effect to some reserved power of a State."

*Veazie Bank* v. *Fenno*, 8 Wall. 547.

In

*South Carolina* v. *United States*, 199 U.S. 437,

the tax was only imposed on the agents of a State so far as they were engaged in a business constitutionally taxable and always an important branch of the Federal revenue.

"The creation of a corporation, it is said, appertains to sovereignty. This is admitted."

*Marshall, C. J., in McCulloch* v. *State of Maryland*, 4 Wheat. 410.

III.

If not an excise tax or a tax upon a corporate franchise, it must be a property tax, a direct tax imposed in part at least, upon the income derived from real and personal property, and as such invalid,

*Pollock* v. *Farmers Loan & Trust Co.*, 157 U.S. 429; S.C. 158 U.S. 601.

The Spanish War tax, as has been said, was but a tax on business earnings.

*Spreckels Co.* v. *McClain*, *supra*, discussed above in I.,

while the case of *Pacific Ins. Co.* v. *Soule*, 7 Wall. 433, cited in *Springer* v. *U.S.*, 102 U.S. 586,

which itself was reversed by the Pollock case, discussed the same law (Act of June 30, 1864, 13 Stat. at Large, Sects. 105, 120), and rests on the reasoning of the Springer case. And that a direct income tax imposed upon a corporation would be equally invalid with one imposed upon a natural person, and this tax be furthermore invalid even if an income tax, for the reason that it is not imposed on natural persons, see cases cited under I.

A tax on the profits of a mining company may, indeed, be said peculiarly to be a direct tax. It is a tax on a portion of the land itself. Moreover, it is more than a mere income tax; it is a tax on the very corpus of the property; for the Court will take notice that the sales of ore represent in no sense *income*, but rather a portion sold of the land itself. Mining companies present a case of "wasting investment." The smelting that may be engaged in is merely a part of the preparation of its own ore for the market.

## IV.

Is there any possibility that there be a *tertium quid* — that this tax be neither an excise tax on business under State charters nor a direct property tax, but an excise on a "commodity" either natural or existing under State statutes, such as was sustained in *Knowlton* v. *Moore*, 178 U.S. 41?

For, while States can tax any commodity not an agency or function of the Federal Government, so the Federal Government may tax any "commodity" — short only of a necessary attribute of sovereignty, such as is the granting of corporate charters, either for the development of the business industry and prosperity of the State itself, its cities and towns, harbors and highways, or for ordinary business purposes.

The arbitrary taxes imposed in England in the past can be no guide to us, for they have no constitution protecting the

citizen against an Act of Parliament, although invading cardinal rights, despite the judgment of Coke to the contrary. But even their Parliament has never imposed a tax upon mere divisibility.

See

*Cobbett's Parliamentary History of England,*

covering the years from 1066 to 1803, where the system of taxation is fully described at the end of each reign. Window taxes, taxes on carriages, or on the number of servants employed, and a thousand others, have been imposed; but never one upon the mere division of property into parts, as, for instance, on tenants in coparcenary, or joint owners not dividing their interests under a corporate franchise. So in the United States, while important instances of Federal taxation on commodities or rights may be found, —

*Scholey* v. *Rew*, 23 Wall. 331.
*Nicol* v. *Ames*, 173 U.S. 509;
*Knowlton* v. *Moore*, *supra;*
*Patten* v. *Brady*, 184 U.S. 608, —

there has hitherto been none on the mere possibility of dividing or the actual division of property, except, of course, upon the deeds or conveyances making such division. In Massachusetts there has existed legislation since the seventeenth century recognizing unincorporated proprietors of fields or wharves held in common, but no taxation has ever been imposed on such divisibility, although the creature of statute, other than the direct tax on the land itself. Thus, in 1698 we find an Act recognizing and authorizing the discontinuance of general fields,

*Mass. Statutes, 1698,* Chap. 12, Sect. 5;

in 1712, an Act authorizing such proprietors of "lands, wharves, or other real estate" to incorporate,

*Mass. Statutes, 1712–1713,* Chap. 9;

in 1785, an Act authorizing the proprietors of general fields to manage them and assess the proprietors *without* incorporation,

*Mass. Statutes, 1785,* Chap. 53,

but never an act taxing such right to hold them as proprietors in common.

So under the Federal Constitution, it is submitted that where property or business is non-taxable either by State or Nation, the mere division of such business or property into shares may not be taxed. There has never in England or America been a tax upon shares owned in ships, independent of the tax on the ship as a whole. If a whole apple is not taxable, the owners of the apple when halved are not for that reason taxable under due process of law.

Finally, that this is not intended for such a tax appears from the fact that insurance companies, though not having a capital stock represented by shares, are included.

## V.

As to the inquisitorial provisions of this Act, whether or not they be unconstitutional as to corporations under the Fourth Amendment, they certainly remain unequal and discriminatory under the Fifth Amendment.

It is admitted that all reasonable inquisitory methods may be instituted in order to determine the assessment of a tax constitutionally imposed,

*Hale* v. *Henkel*, 201 U. S. 43,

but it is not only questionable, but was admitted in the debates in Congress that the requirements of this Act go far beyond such necessary inquisition.

And conceding the correctness of Mr. Justice Harlan's dissenting opinion in *Hale* v. *Henkel*, it may yet be urged that its reasoning applies only to a corporation under investigation by the sovereignty which created it. Inquisitions by other sovereignties, even for lawful purposes of revenue, must be judged by the ordinary constitutional law applicable to individuals. That is, the Federal Government in ordering this inquisition is not, as in *Hale* v. *Henkel*, conducting an investigation into the affairs of a corporation which it created, or which, by reason of the interstate

commerce clause of the Constitution, is subject to its jurisdiction and control.

## VI.

If the Congress have any power under the Constitution to tax the earnings and profits of State corporations and not of individuals, it is only under the Interstate Commerce law of the Constitution. Incomes or profits derived from interstate commerce by persons and corporations, or either, may, perhaps, be taxed by the Congress, — not as a direct tax, but as a prerequisite to doing such business.

This legislation, Section 38 of the Act of August 5, 1909, with the prior legislation creating the Federal Bureau of Corporations, was apparently based upon the Report to Congress of the United States Industrial Commission of 1902. All the reasons given for such legislation in the debates in Congress are there anticipated, but that report, while it recommended Federal taxation of corporations engaged in interstate commerce, carefully limited it to such.

> *Final Report, U.S. Industrial Commission*, Vol. XIX., pp. 647, 648, 649, 650, 651, 687, 691, 696, 708, 710, 715, 719, 720.

"The privilege or facility offered to a corporation to engage in interstate commerce is of two kinds: First, the privilege to be a corporation, which is derived from the State and cannot be taxed by the Federal Government, and second, the privilege to engage in interstate commerce, which is beyond the control of the States and within the control of Congress, and may therefore be taxed by the power that confers or permits it."

> *Ernest W. Huffcut on Constitutional Aspects of Federal Control of Corporations, ibid.*, p. 721.

VII.

That the provisions of this Section 38 originated in the Senate and were added to a complete bill originating in the House, appears from the House and Senate Journal.

*H.R. (1909), No. 1438, and Conference Report, Journal of Senate (1909)*, p. 175.

It was avowedly not primarily a revenue measure, but one aimed at Federal control of corporations, and is not *in pari materia* with the rest of the House bill.

*Message of the President, June 16, 1909, in Journal of Senate*, pp. 109, 110.

While conceding that in ordinary cases it may be impossible to investigate the history of a measure finally duly enacted into law, there must yet be some limit to the ability of the two Houses of Congress to disregard this principle. In England it may be admitted that a violation of the Constitution in this particular can only be resented by that House whose prerogatives are infringed; as, for instance, the House of Commons in the case of the present Budget. But under our written Constitution, not only a measure contrary to its principles, but one enacted in a manner contrary to its provisions, is absolutely void. The lower House may not violate Article I., Section 7, of the Constitution by the mere act of ratification of the unconstitutional action of the Senate.

The Constitution provides (Art. 1, Sect. 5, Cl. 3) that "Each House shall keep a Journal of its proceedings. . . ." It has been held that a statute is not even *prima facie* valid when other records of which the Court must equally take notice (*i.e.*, Journals of House and Senate) show that some constitutional formality is wanting.

Cooley, J., in *People* v. *Mahaney*, 13 Mich. 481.

And in general it has been held in many States that for the purposes of ascertaining whether an act has been passed according to

the forms required by the Constitution the Courts take judicial notice of records as contained in legislative journals.

*State* v. *Smith*, 44 Ohio St. 348.
*People* v. *Rice*, 64 Mich. 385.

VIII.

Constitutional authority for this section of the Act in question must be affirmatively expressed among the powers given to it by the Constitution or be necessary or proper therefor. If not so given — particularly if negatived in divers clauses of the Constitution itself — they are reserved to the States by the Tenth Amendment.

And there is a larger question than the mere revenue question here involved. Avowedly this tax is imposed for the purpose of bringing all corporations, and that immense preponderance of business, manufacturing, mining, commercial or trading now carried on by State corporations, under the supervision, control, and taxing power of the Federal Government. This high Court will consider the Act of Congress in its true intent and with full regard to its ultimate consequences, and in judging it will apply the Constitution in its broadest spirit and meaning. The people in establishing it meant to keep their ordinary property rights and domestic affairs free from control by the central Government. That question, not merely political but in the highest sense constitutional, is legitimate subject for argument.

"No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass."

*Marshall, C. J., in McCulloch* v. *State of Maryland*, 4 Wheat. 403.

JOHN G. JOHNSON. FREDERIC JESUP STIMSON.

LAWRENCE M. STOCKTON,
HARRIS LIVERMORE,
*Of Counsel.*